included the narrower terms "custody" and "control". Thus if the prosecution, under the repealed Proclamation, proved custody [characteristic (c)] or control [characteristics (b) and (c)] they were deemed to have proved "possession" in its full meaning "and it shall not be necessary to prove that the person in possession of such thing ..... was aware of the nature ..... of such thing" — viz. characteristic (a).

In the view which I take of the correct interpretation of section 37(d) the learned District Judge misdirected himself upon the burden of proof, and the appeal must be allowed.

Appeal allowed

SIM CHWEE CHUA v. REX.

[App. Cr. Juris. (Murray-Aynsley, C.J.) October 1, 1951]

[Singapore — Magistrate's Appeal No. 111 of 1951]

Dangerous Drugs Ordinance, 1951, ss. 4, 5 and 6 — Possession.

In this case the appellant was charged for importing 174 lbs. of raw opium an offence contrary to section 4(1) and punishable under section 4(2) of the Dangerous Drugs Ordinance, 1951; alternatively for possession of the said opium contrary to sections 4 and 5 and punishable under section 6 of the said Ordinance. The learned District Judge found the appellant guilty on the alternative charge and sentenced him to two and half years rigorous imprisonment. The undisputed facts briefly were as follows: — At about 6.10 a.m. on the 31st May 1951 a party of Revenue Officers chased, stopped and searched a motor sampan with appellant as the sole occuppant, heading for land. In the aft, underneath a loose board they found 52 slabs of black substance, and fore another 27 slabs, which were subsequently proved by the Chief Chemist to be raw opium.

The appellant's defence was that he had no knowledge that there was opium abroad as on 21st May 1951 some ten days before his arrest he had hired the sampan for two weeks to one Tan Hu Chin who had come to him on the afternoon before the day of his arrest and told him that the sampan has broken down outside the breakwaters and that the appellant should carry out the repairs immediately. He stated that at the time of his arrest he was on his way to return the sampan to Tan Hu Chin. Tan Hu Chin gave evidence and stated that he himself had taken delivery of the opium in question from a ship lying outside the breakwaters and concealed it in the sampan when it was discovered at the time of the appellant's arrest.

The learned District Judge found it (i) "exceedingly difficult to believe that the accused had no knowledge that the opium was in the boat", (ii) "hard to believe" Tan who was, he was convinced "a stooge who was prepared to take the rap for money" and (iii) proved that the appellant was fully aware that there was in the sampan opium of which he had the custody and control. The accused was accordingly convicted and sentenced to two years and six months imprisonment.

The appellant appealed on the grounds inter alia (a) that there was no evidence to support the finding of the learned District Judge that the appellant was fully aware that there was opium in the sampan (b) that the learned District Judge did not, as he might have done, find that any of the presumptions contained in section 37 of the Dangerous Drugs Ordinance, 1951, arose and therefore did not consider, as he should then have done, whether the appellant had rebutted such presumption.

Held, that the evidence justified the finding of the District Judge, who had in his Judgment dealt with all relevant matters. Appeal dismissed.

MAGISTRATE'S APPEAL.

M. B. Brash for the appellant.

A. D. Farrell (Crown Counsel) for the Crown.

Murray-Aynsley, C.J. : — In this case I reserved judgment because of the citation of an unreported decision* of Mr. Justice Brown which was not familiar to me. After considering it I agree with the learned Crown Counsel that it has no application here.

I agree with the admirable judgment of the learned District Judge which, I consider, deals with all relevant matters and I do not wish to add anything. The appeal is dismissed.

Appeal dismissed.

TAN WEE HAN & ANOR. v. MEYAPPA CHETTIAR.

[Court of Appeal (Taylor, Spenser Wilkinson and Wilson, JJ.) November 19, 1951]

[F.M. — Civil Appeal No. 26 of 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 11 — Construction of s. 11 — Priorities — Distinction between reinstatement and replacement.

Where a mortgagor paid a mortgagee in occupation currency and directed the mortgagee to transfer the mortgage to a third party, in lieu of reconveyance, the mortgage was discharged as regards the original mortgagee but a post-war mortgage of the same property for the amount due on revaluation is a reinstatement, not a replacement, of the security. Appeal dismissed.

APPEAL from the judgment of Jobling, J. reported at p. 75 (1951) Malayan Law Journal.

Ong Huck Lim for appellant No. 1.

R. D. Hume for the respondent.

The facts and arguments appear sufficiently from the judgments of Taylor and Spenser Wilkinson, JJ.

Cur. Adv. Vult.

Taylor, J. : — This is a reinstatement appeal under the Debtor-Creditor Ordinance. The circumstances are a little unusual. Stripped of matters no

* The decision referred to is that of Ho Seng Seng v. Rex reported in this issue at p. 225 — Ed. M.L.J.

longer material the facts are these. Three co-owners of land mortgaged it to a chettiar, before the war, for $35,000; during the enemy occupation they paid off the mortgage, without demand, but instead of taking a reconveyance of the land they directed the chettiar to transfer the mortgage to a friend of theirs, Dr. Tan; they were entitled to do so and the chettiar was bound to comply with the direction. After the war, the chettiar claimed that the Japanese money paid to him was worth only $2,000 so that $33,000 of the original mortgage debt was still outstanding; he sued the mortgagors, and Dr. Tan, for that sum, or alternatively for reinstatment of the mortgage or substitution of some other security for that amount and interest.

As the property is now worth much more than the amount claimed, the trial Judge decided that it was unnecessary to reinstate the original mortgage and that it would suffice if the three mortgagors executed a further mortgage over the whole of the same land — thus leaving Dr. Tan's position, as transferee of the original mortgage, unaffected. The chettiar is content with this arrangement but Dr. Tan appeals on the ground that by a separate transaction he had purchased outright the undivided one-third share of one of the mortgagors. Dr. Tan contends that he, as a purchaser, should not be subject, as to this one-third share, to the new mortgage; the chettiar was not a party to, or concerned with, the separate sale of the one-third share and says that he ought not to be affected by it. Thus, the dispute is a question of priorities. Should the chettiar's claim as mortgagee be postponed to Dr. Tan's claim as purchaser?

The principle is clear. Where a charge purports to have been paid off in full but was in truth paid off only in part, the chargor must, if possible, reinstate the charge for the balance but if he cannot do so because in the meantime he has sold the property to an innocent stranger, then he must furnish other property as security. The questions are, therefore, whether the land was sold in the meantime and whether, in the circumstances, Dr. Tan is an innocent stranger. These questions depend on the true construction of the Ordinance. Section 11(1), omitting provisions not applicable to this case, reads thus :—

> Where a debt purporting to be discharged.....by payment in occupation currency is.....deemed to be partly undischarged and where.....such debt.....was secured by a charge over property.....and such charge purports to have been discharged.....such discharge shall (subject to the proviso) be void as against any person claiming through the chargor and the charged property shall stand charged with the revalued balance of the debt.....
>
> Provided that:—
>
> Where the charged property.....has after its purported discharge.....been transferred or charged to a bona fide purchaser or chargee for value.....the discharge shall not be void but the title of such purchaser or chargee.....shall prevail against the title of the original chargee.

For the purposes of this section "charge" includes mortgage and discharge of a charge is equivalent to reconveyance.

The key to the construction is the use of the word "discharge" in two distinct ways. In the first limb of the sentence, — "debt has been discharged" — the word "discharge" refers to the payment of cash by the debtor to the creditor. In the second limb — "charge has been discharged" — the word discharge refers to the disencumbering of the property. The two charges are not synonymous or parallel; they are reciprocal actions in opposite directions. Discharge of the debt is a concrete movement of cash from debtor to creditor. Discharge of the charge is the abstract movement of the legal encumbrance, by the creditor, from the debtor's property.

The section is most clearly understood in relation to a transaction, similar to the present one in substance but slightly different in form. Say that the debtor paid off the mortgage and that the chettiar reconveyed the land by a deed which was registered and that nothing further occurred. The section applies easily these facts; the debt was discharged and the encumbrance was discharged; the transaction was, at the time, closed; now, by operation of the Ordinance the debt is in part revived and the encumbrance is revived as security for the revived part of the debt. Carry this hypothetical case a stage further; say that after the reconveyance the ex-debtor had mortgaged the land, for the same amount, to the doctor; the proviso now applies; if the doctor acted *bona fide* his title prevails against the chettiar's.

Transfer of a mortgage is merely a conveyancing device to avoid the trouble and expense of reconveying and making a fresh mortgage but it does not necessarily have the same effect under section 11. In the first place, the second limb of the main sentence does not clearly apply; the debt was discharged but the charge was not discharged; it was transferred to a third party; the encumbrance is not lifted from the land. Nevertheless I think that the chettiar is still within the terms of the main sentence because he divested himself of all interest in the land; so far as he was concerned the charge over the property was discharged. By operation of law, this discharge is now avoided as

against the chargor and the chettiar's interest in the land has revived.

The word "security" also has several meanings; sometimes it means the property: — where land is mortgaged the land is a security for the debt; sometimes it means the instrument: — a mortgage is a security for money lent. In section 11 I think "security" is used in the former of these senses; furnishing the security means making property available to be charged; executing the charge (which is formalising the security) is provided for in those words. Say that a single, indivisible house, worth $100,000, was mortgaged first for $30,000 and, secondly, for $20,000. Both mortgagees are fully secured, though (in the first sense) there is only one security; if the house is sold there is only one sale and both are paid in full out of the proceeds. No question arises unless the house is destroyed uninsured; in that case the land may be sold for only $30,000; the one physical security has shrunk in value; the second mortgagee is left with his paper security only. If both had been paid off during the occupation the first mortgagee would claim reinstatement and the second would claim replacement; if, however, the house still stood, both would claim reinstatement.

If, in this case, after purported extinction of the chettiar's mortgage the three borrowers had sold and conveyed the whole of the land to a stranger, they would have been called upon to replace — that is to find other property as security; actually they were called upon to make a fresh mortgage over the same land; the physical security was the same; the legal security was the same except that it was subject to a prior encumbrance. The learned trial Judge appears to have thought that because a new mortgage was to be executed, this was a case of replacement. He was then using the word "security" in the second sense but I do not think that is correct under section 11. In my view this was a case, not of replacement but of reinstatement, subject to the proviso.

The question whether the rights of the transferee of the mortgage prevail over those of the chettiar could, I think, have been litigated under sub-section (5) but in this instance it was agreed that they should prevail. The claim was that the doctor should have priority by virtue of the separate and prior instrument. This instrument is an agreement for the sale of an undivided one-third share in the land free of encumbrances; it is not, and does not purport to be, a conveyance; it expressly provides for the subsequent execution of a proper assurance; it also appoints the purchaser to be the vendor's attorney for the purposes of completion. Assuming that it amounts in equity to an alienation by the vendor of the whole of his interest in the land it operates as such, only as between the parties; it does not affect other persons who had no notice of it; in any event it cannot be stronger in favour of the doctor than a legal conveyance made at the same time would have been. The proviso, in terms, protects the third party if the property was transferred to him after the purported discharge of the original charge; this instrument, was made before the purported discharge; therefore the title of the chettiar, under the original mortgage, prevails against any title which the doctor could derive from the agreement. This does not mean the title of the doctor is avoided as against the vendor of the one-third share; the proviso does not avoid the purchaser's title; it merely makes it subject to a prior encumbrance.

In these circumstances it is not necessary to decide whether "transfer" in the proviso means a legal transfer and does not include an equitable assignment but I would remark in passing that the use of the word "title" in the proviso and the phrase "appearing from the register" in sub-section (5) indicate that conveyances of the legal estate or interest are what the draftsman had chiefly in mind.

It was suggested in argument that at the date of the agreement the original mortgage to the chettiar was still subsisting so that the vendor had no legal estate and an equitable assignment was the most that he could make; also that as the doctor acquired the legal estate a week later by transfer of the legal mortgage, he is entitled to tack it on to the equitable transfer of the beneficial estate in one-third. This is ingenious but it is not correct. In the first place, it was agreed by all parties at the trial that the new mortgage should be subject to the doctor's rights as transferee of the original mortgage. The doctor took a real benefit by that arrangement because, as I have shewn, the chettiar had a litigable claim to priority. The doctor is estopped from tacking in such a way as to prejudice that arrangement. Secondly, this legislation is special; it sets out to rectify, so far as may be, the anomalous consequences of the enemy occupation; some of its provisions are necessarily and consciously at variance with ordinary law and equity and if there is a conflict the provisions of the statute must prevail. The Ordinance introduces a new form of relation back; it revives an extinguished legal interest with effect from the date of the apparent extinction and overrides

all other interests, except such as are saved by strict construction of the proviso.

For all these reasons I am of opinion that the appeal should be dismissed with costs.

Spenser Wilkinson, J.: — In this case the respondent lent to the Estate of one Chuah Aik Him, deceased the sum of $35,000 on two mortgages of certain property belonging to some of the beneficiaries and one Chuah Kok Wee joined in the mortgages as surety. The loans were repaid by the appellant on the 30th January, 1945 at the instance of one of the beneficiaries, one Tan Un Ting, and on the 5th February, 1945 the respondent transferred the mortgages to the appellant. Prior to this transfer on the 30th January, 1945, Tan Un Ting entered into an agreement with the appellant to sell to him his one-third interest in the mortgaged property for the sum of $50,000.

The main dispute in the Court below was whether the money was repaid with or without demand, and the learned Judge found that as repayment was not demanded the amount of the purported repayment fell to be revalued under section 4 of the Debtor and Creditor (Occupation Period) Ordinance 1948 and that as a result of that revaluation the sum of $28,500 was still due in respect of the principal debt, with interest thereon from the 1st October, 1949.

The next question was whether the mortgages in question should under the provision of section 11 of the same Ordinance be reinstated, but on the respondent's stating that he would be satisfied with a third mortgage on the property in lieu of reinstatement of the original mortgage an order was made calling upon the 1st, 2nd and 4th defendants to execute a third mortgage over the land in question in favour of the respondent. From this part of the learned Judge's decision the appellant, who was the 3rd defendant in the Court below, appealed on the ground that as he, the appellant, had acquired Tan Un Ting's one-third share of the property it was not possible for Tan Un Ting to be ordered to execute a third mortgage of this one-third share.

Section 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948 is a long and complicated section, and I find it somewhat difficult to ascertain the true construction of its provisions. It appears to me, however, that the learned Judge in the Court below has not construed sub-section (1) of that section entirely correctly or has at least not very clearly expressed his views thereon. After stating that section 11(1) provides for the reinstatement of the security only where the original charge has been discharged he goes on to say :—

> "In this case the charge has not been discharged but transferred to another person and this provision of the law is inapplicable."

Nevertheless he proceeded to apply sub-section (5) of the same section. It appears to me that if sub-section (1) of section 11 does not apply to the case then the whole section is inapplicable and recourse could not be had to sub-section (5). I think, however, that section 11 applies to this case, because, although the mortgaged property was not reconveyed to the mortgagee, the transaction whereby the debt was repaid in Japanese currency and the mortgage transferred to the appellant was in substance a redemption of the mortgage and that thereby the charge of the land *to the respondent* was in fact discharged.

As I read the provisions of sub-section (1) the result of it is that, subject to the proviso, where a mortgage debt purporting to have been discharged during the occupation is revalued under section 4 of the Ordinance, then in whatever way the charge of the land to the original mortgagee has been extinguished the land is, by operation of law, re-charged to the original mortgagee to the extent of the revalued balance of the debt and interest. The rest of the sub-sections of that section are designed to bring into existence the necessary assurances and to perfect the registry of deeds so as to bring them into conformity with the situation that the land has been so re-charged. The only difficulty I can see in the way of so construing the section is in the wording of sub-section (8) which refers to the provisions of sub-sections (3) and (4) as though they were alternatives (which in my opinion they are not), but makes no provision for the Court to order that the provisions of sub-section (1) shall cease to apply in cases where the original security is replaced instead of being reinstated. But this difficulty is, I think, surmounted by the express provision in sub-section (5) which enables the Court to make an order that the security is not to be reinstated.

In my view, therefore, upon the commencement of the Ordinance and untill the order in these proceedings for replacement was made, the land stood charged to the respondent for the amount of the revalued debt and and the respondent was entitled to have the original mortgage reinstated against all the parties thereto or anyone claiming through them, except in so far as there might have been a transaction in favour of a

bona fide purchaser under the proviso to sub-section (1); and I think the effect of the statute is to go behind any transactions there may have been (other than those to *bona fide* purchasers, as defined) to enable this to be done.

The section expressly says that the discharge of the land shall be void against any person claiming through the chargor. These words appear to me to cover any transactions there may have been before or at the time of the discharge. The appellant cannot in my view claim the benefit of the priviso, because that covers only transactions which take place after the discharge and the transaction upon which he relies did not take place after but before the discharge of the charge to the Chettiar. In my view, therefore, he is liable equally with the other mortgagors to take whatever steps are necessary either to reinstate the original mortgage or to replace it. In this case he has been ordered to replace and the transaction of the 30th January, 1945 must to this extent give way to that order. I can, therefore, see no reason to disturb the order made by the learned Judge in the Court below, and I would dismiss this appeal with costs.

Wilson, J. : — I have read the judgments of Taylor, J. and Spenser Wilkinson, J. in this appeal. I agree that the appeal should be dismissed with costs, and have nothing to add.

Appeal dismissed.

KHOO SOO JIN & ANOR. v. LYE YEW SONG.

[Court of Appeal (Taylor, Spenser Wilkinson and Wilson, JJ.) November 19, 1951]

[F.M. — Civil Appeal No. 25 of 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948, ss. 4(2)(b)(ii) and 11 — Mortgage — Entry into a possession by mortgagee.

The Court of Appeal dismissing the Appeal further — **Held**, that entry into possession by a mortgagee may amount to a continuing demand within the meaning of the Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 11.

Cases referred to :—

(1) *Bovill v. Endle* (1896) 1 Ch. at p. 651.

(2) *Ex Parte Wickens* (1898) 1 Q.B.D. 543

(3) *Ibrahim & Co v. Nainam Sahib & Co.* (1951) M.L.J. 103; 2 M.L.R. 71.

(4) *Chin Thin Sin v. Ng Kwan Heng* F.M. — Civil Appeal No. 28 of 1950 (Unreported).

COURT OF APPEAL, appeal from the judgment of Jobling, J. reported in (1951) M.L.J. 74.

F. G. Pooley for the appellants.

R. D. Hume and *G. H. Conaghan* for the respondent.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Taylor, J. : — This appeal raises a short question of the construction of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

Before the war the testator, now represented by the respondent, mortgaged certain property to the appellants for $25,000. During the enemy occupation the mortgagor was in difficulties, the interest was in arrear and in March 1944 another creditor obtained the appointment of a receiver by way of execution. The mortgagee went into possession of the property, as he now says, merely to protect his security and not with a view to enforcing payment of the principal; he collected the rents, which exceeded the interest, until the mortgagor paid off the principal; this was in June 1945.

After the war the mortgagees claimed the difference between the original mortgage debt and the value of the depreciated currency but the application was refused and they now appeal.

The principle of the Ordinance is simple. If, during the occupation, a creditor demanded Japanese currency in payment of a pre-war debt, and received it within three months of the demand, then he received what he asked for and the transaction is closed. But if a debtor, to suit himself, paid off a debt with cheap money so that the payment was really worth only a fraction of the debt, then the payment must be revalued and the debtor must pay the difference. The Ordinance is designed to relieve either the debtor or the creditor according to circumstances. The test is demand. It need not be formal or even explicit. It is provided that the mere rendering of an ordinary tradesman's bill may be a sufficient demand and it was conceded in argument that service of a writ would constitute a demand although the writ containted no rogatory word. It is, I think, obvious that if the bill or writ never reached the debtor he would not be affected. Similarly, if a mortgagor were away from home and remitted the money before he heard that the mortgagee had entered, he would have paid without demand. In short, the demand may be oral or written, formal or informal,